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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,
v.
TIMOTHY DOUGLAS MORSE,
Defendant and Appellant.

A101894

(Solano County Super. Ct. No. 203963)

A stop and search of Timothy Douglas Morse's car revealed a Molotov cocktail in the trunk that, Morse admitted, he had made and meant to use to fix his car or, failing that, to torch it. A jury found him guilty of possessing an incendiary device in violation of Penal Code section 453, subdivision (a) (unspecified further section references are to that code), and the court found true a bifurcated allegation of a prison-term prior for driving under the influence (DUI) (§ 667.5, subd. (b); Veh. Code, § 23153, subd. (a)). Sentenced to a midterm of two years for the offense plus one for the prior, Morse appeals. We find no error and affirm the judgment.

BACKGROUND

The trial testimony came entirely from the arresting officer, Stuart Tan of the Vacaville Police Department, and Morse. Tan responded at 12:30 p.m. on November 29, 2002, to a radio dispatch for a Dundee Court address in Vacaville and, seeing a man (Morse) drive off as he got there, had a fellow officer, Larsen, stop the car, a 1988 Toyota Cressida. Tan went to the stop site, a short distance away, and did a search of the car. In the trunk, along with a tool belt and various tools, he found what he believed was an incendiary device—a Frappuccino bottle about two-thirds full of a goldish liquid that looked like gasoline. A piece of cloth stuck partly out through the top and the rest went

down into the liquid. The device was wrapped in a knotted plastic bag, and the bag was inside a plastic bucket. Turning toward Morse, who was resting against Larson's car, Tan held up the item and asked, "What is this?" Morse told him it was "for fixing his car." When Tan gave him a puzzled look, Morse explained that he had been working on his car because it wasn't running right, was becoming frustrated with fixing it, and was going to use the device "to burn up his car." He said he had made the device himself and that it contained gasoline. After being placed under arrest for having the device, Morse spoke twice more about it, once there and once at the police station, staying with "the same story," that he was frustrated with his car: "He'd been working on it for some time. Couldn't get it to run right. So he made this device to burn up his car." Tan was not sure whether Morse was joking, Morse having smiled a couple times during the conversation, and so "asked him several times if he was serious" about what he meant to do with the device. Tan asked at least three times, including once at the station when confirming that this was Morse's official statement.

Morse's testimony, implicitly rejected by the jury, was that he made the device only "to prime the carburetor of a car, to fix it, start it," that he was not serious about burning anything up with it, and that he said that because it "resembled" an incendiary device and Tan "was going to think what he wanted to anyways." Morse claimed "hands-on experience" but no formal training in mechanics. Conceding on cross-examination that he didn't know whether his 1988 Toyota had a carburetor or, instead, had fuel injection, he maintained that the gasoline was to fix *another* car of his, a van he had been working on earlier that same week. He could not say whether the van was a 90's, 80's or 70's model, but he thought it was a Dodge and had a carburetor (although he could not say what kind). After equivocating on whether he knew gas was highly volatile and could be ignited by a lit cigarette, he admitted being there when a friend, Robert Pulido, dropped a lighter while siphoning gas for Morse's vehicle and ignited a Hertz truck.

Tan testified in rebuttal that Morse had never said anything to him about working on a van or using the device for anything beyond burning up his Toyota.

DISCUSSION

I. *Intent to Torch One's Own "Property"*

Morse claims lack of substantial evidence, not for lack of evidence that he intended to set his car on fire, but because, he urges, one cannot be convicted under section 453 for having an incendiary device with an intent to torch *one's own* "property." Conceding that section 453 places no such limitation on the word "property," he argues that we should imply one from the arson statute, section 451, which does.[1] Morse also likens section 453 to an "attempt" statute that "seeks to prevent and penalize arson at its inchoate or preparatory stage of possessing the material needed to create the fire"; then, citing federal law construing a violent-felony provision of the Armed Career Criminal Act (18 U.S.C. § 924(c)(1)) to require that a prior attempt conviction involve a risk of violent confrontation (*U.S. v. Weekley* (9th Cir. 1994) 24 F.3d 1125), he urges that there is no such risk when one intends to torch his own property. He also points out that mere possession of an incendiary device is not enough to violate section 453, that one must also have a willful and malicious intent (see fn. 1, *ante*). Finally, he argues that to read the attempt-like section 453 "so as to be broader in scope than section 451 would produce a legal anomaly" and "demean the importance of . . . section 4, which requires that code provisions 'be construed according to the fair import of their terms, with a view to effect

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[1] Section 451 states in part: "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." [¶'s] (d) Arson of property is a felony punishable by imprisonment in the state prison for 16 months, two, or three years. For purposes of this paragraph, arson of property does not include one burning or causing to be burned his or her own personal property unless there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property."

Section 453 provides in subdivision (a), without any stated limitation there or later in the section on the definition of property: "Every person who possesses, manufactures, or disposes of any flammable, or combustible material or substance, or any incendiary device in an arrangement or preparation, with intent to willfully and maliciously use this material, substance, or device to set fire to or burn any structure, forest land, or property, shall be punished by imprisonment in the state prison, or in a county jail, not exceeding one year."

[their] objects and to promote justice.'" "Thus," he argues, "a particular kind of intention must be proven, i.e.[, an] intention to destroy *another's* property." We are not convinced by his arguments and find uncited California case law on arson to be largely dispositive.

The general arson statute does not require, as Morse supposes, an "intention to destroy . . . property," whether another's or one's own; it requires only a general intent. "The statute does not require an additional specific intent to burn a 'structure, forest land, or property,' but rather requires only an intent to do the act that causes the harm. This interpretation is manifest from the fact that the statute is implicated if a person 'causes to be burned . . . any structure, forest land, or property.'" (*People v. Atkins* (2001) 25 Cal.4th 76, 86 (*Atkins*).) While the code did once require a specific "intent to destroy," this was dropped with a recodification in 1929 (*id.* at pp. 86-87), "leaving 'wilfully and maliciously' as the only mental element" (*id.* at p. 87). "Arson's malice requirement ensures that the act is 'done with a design to do an intentional wrongful act . . . without any legal justification, excuse or claim of right.' [Citation.] Its willful and malice requirement ensures that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional ignition or act of setting a fire: '"in short, a fire of incendiary origin."'" (*Id.* at p. 88.) Thus, if no intent to destroy property is needed for arson generally, Morse cannot argue that it is anomalous not to imply one as to the *property of another* under section 453.

Limiting arson to burning the property or dwelling of another was a common law tradition initially codified in California (*In re Bramble* (1947) 31 Cal.2d 43, 48-49), like the requirement of a willful and malicious act (*In re Stonewall F.* (1989) 208 Cal.App.3d 1054, 1061, fn. 7), but abandoned by the Legislature after 1929. One could be convicted, for example, of burning a dwelling, "'whether the property of himself or of another'" (*People v. George* (1941) 42 Cal.App.2d 568, 570-571 [rejecting equal protection and due process challenges], quoting former § 447a). For 50 years, from 1929 through 1979, all versions of arson as defined in former sections 447a and 448a used that language—"whether the property of himself or of another" (Stats. 1929, ch. 25, §§ 1-2, p. 46; Stats. 1959, ch. 1462, § 1, pp. 3756-3757; Stats. 1066, 1st Ex. Sess., ch. 58, § 1, p. 442; Stats.

1976, ch. 1139, §§ 198-199, pp. 5118-5119; Stats. 1977, § 2, p. 2220; Stats. 1978, ch. 579, §§ 19-20, pp. 1984-1985).

Meanwhile, current section 453's predecessor, former section 452, subdivision (a), was first enacted in 1966 legislation that, like the current version, contained no property-of-others limitation. It stated: "Every person who possesses any flammable, explosive or combustible material or substance, or any device in an arrangement or preparation, with intent to willfully and maliciously use such material, substance or device to set fire to or burn *any buildings or property mentioned in this chapter*, is punishable by imprisonment in the state prison . . . ." (Stats. 1966, 1st Ex. Sess., ch. 58, § 3, pp. 442-443, italics added.) Property mentioned in the arson statutes of the time contained no such limitation, of course, and applied to a defendant burning "the property of himself or of another . . . ."

Today's limitation of arson to the property of others was added in 1979 legislation that repealed former sections 447a and 448a, recast their provisions as new sections 451 (arson) and 452 (unlawfully causing fire through reckless acts), and renumbered former section 452 as current section 453, the one at issue here. (Stats. 1979, ch. 145, §§ 1-17, pp. 337-341) Each successor arson statute, in language identical aside from exceptions, exempts burning or causing to be burned one's own personal property (§§ 451, subd. (d) [except with intent to defraud or injury to another's property], 452, subd. (d) [except with injury to another's person or property]), as added in the 1979 legislation (Stats. 1979, ch. 145, §§ 1-10). Notably, the legislation renumbered former section 452 as new section 453 but *did not* insert such a limitation into it. Further, the legislation replaced the former provision's reference to "any buildings or property mentioned in this chapter" (Stats. 1966, 1st Ex. Sess., ch. 58, § 3, p. 442), with "any structure, forest land or property" (Stats. 1979, ch. 145, § 12, p. 339) and added chapter-wide definitions of the three terms —structure, forest land and property (*id*., § 6, p. 338, adding § 450). Those definitions remain unchanged today and contain no restriction to the property of others.[2]

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[2] Section 450 provides in pertinent part: "In this chapter [currently §§ 450-457.1], the following terms have the following meanings: [¶] (a) 'Structure' means any building, or commercial or public tent, bridge, tunnel, or powerplant. [¶] (b) 'Forest land' means

Our task is to give section 453 the meaning expressed, for "[i]f the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history" (*People v. Knowles* (1950) 35 Cal.2d 175, 182-183). Morse's argument has no support under those precepts. Section 453 imposes no express limitation on "property" to the property of others, and the chapter definition, which, as here, controls in the absence of a contrary provision in the section (§ 450), provides no such limitation either (*id.*, subds. (a)-(c)). Plus, we have the added circumstance that the Legislature, in the 1979 legislation, after 50 years of abrogating the limitation, reintroduced it into sections 451 and 452 but *did not* introduce it into newly renumbered section 453, part of the same reorganized chapter on arson-type offenses. """[W]hen different language is used in the same connection in different parts of a statute it is presumed the [L]egislature intended a different meaning and effect."""" (*People v. Moore* (1986) 178 Cal.App.3d 898, 903, quoting *People v. Ector* (1965) 231 Cal.App.2d 619, 625.) Finally, "it should not 'be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.'" (*Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92.) For 50 years, the law had imposed no property-of-others limitation on arson crimes generally, and none had been placed in the predecessor incendiary-device statute, first enacted in 1966, 36 years into that time period. No express inclusion of such a limitation appears in the 1979 statute, and none arises by necessary implication.

We reject Morse's reliance on prior attempt convictions under federal law. The effort is strained to begin with, there being no similarity to the question here, and Morse's root premise that section 453 offenses are like attempted arsons fails at the outset. Arson attempts are dealt with expressly in section 455, a section Morse does not even mention. It is also clear from the language of section 453 that the Legislature's concern was not

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any brush covered land, cut-over land, forest, grasslands, or woods. [¶] (c) 'Property' means real property or personal property, other than a structure or forest land. [¶] . . . ."

with punishing arson attempts but with deterring the dangerous act of possessing an incendiary device, a danger magnified in this case by having it in the trunk of a car that might be involved in an accident and imperil other persons and property in the vicinity. Nor does the requirement of an intent to willfully and maliciously use the device (see fn. 1, *ante*) render the offense an attempt. The mental state requirement was evidently meant to insulate certain acts of innocent possession and to recognize that one who has an intent to use an incendiary device as an incendiary device is, obviously, more inclined to do so and therefore a greater danger.[3]

Section 453 does not require an intent to affect the property of another.

II. *Prosecutorial Misconduct*

Morse cites as misconduct, and as violating limine rulings or understandings, the prosecutor's elicitation of testimony about his parole status and the incident in which he and another man started a fire while siphoning gas. No misconduct is shown.

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[3] Section 450 provides in part: "In this chapter [currently §§ 450-457.1], the following terms have the following meanings: [¶] . . . [¶] (e) 'Maliciously' imports a wish to vex, defraud, annoy, or injure *another person*, or an intent to do a wrongful act, established either by proof or presumption of law." (Italics added; see also § 7, subd. 4.)

One could argue, though Morse does not, that by requiring that the actor intend to affect another person, the definition implies a limitation to the *property* of another. The argument, however, would come too late. The requirement of malicious action existed throughout the 50 years during which the arson statutes expressly covered a defendant's burning of property, "whether the property of himself or of another." While the section 450 definitions did not exist during that time, a definition of "maliciously" was provided in section 7, subdivision 4, that was identical except for the current section's addition of the word "defraud." To imply a requirement of malice toward the property of others obviously would have been irreconcilable with the statutes' express language during that time (see generally *People v.* Broussard (1993) 5 Cal.4th 1067, 1071 [literal meaning is not given where doing so results in absurd consequences not intended by Legislature]), and this helps to explain the Supreme Court's recent observation that arson's malice requirement only ensures that the act is done with a design to do an intentional wrongful act, without legal justification, excuse or claim of right. (*People v. Atkins*, *supra*, 25 Cal.4th at p. 88.) That construction is also consistent with the definition's alternative phrasing, "or an intent to do a wrongful act . . . ." (§§ 7, subd. 4, 450, subd. (e); *In re Stonewall F.*, *supra*, 208 Cal.App.3d at p. 1065.)

"It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order" (*People v. Crew* (2003) 31 Cal.4th 822, 839), and here there was an in limine defense motion to bar revealing parole status to the jury, and a ruling, "We are not going to do that," after the prosecutor said he did not plan to do so. The problem for Morse, however, is that the instances of asserted misconduct cited in his opening brief came during examination done *outside the jury's presence*, during testimony on his pretrial motion to excluded statements made to police (part III, *post*). Recognizing this in his reply brief, he alters his claim to complain of one place in the *trial* testimony where the prosecutor, asking Officer Tan what he did in the department's crime suppression team, got the response, "Um, my primary duty is to monitor and assist with subjects on parole or probation within the County of Solano." This was not misconduct, for it did not imply that Tan had contacted Morse in that role. The prosecutor, in fact, immediately clarified that point.[4]

Moreover, the point is not preserved for appeal. "A claim of prosecutorial misconduct is generally reviewable on appeal only if the defense makes a timely objection at trial and asks the trial court to admonish the jury to disregard the prosecutor's question. [Citations.] '"[O]therwise, the point is reviewable only if an admonition would not have cured the harm."'" (*People v. Sapp* (2003) 31 Cal.4th 240, 279.) No objection based on misconduct was made below, and no impossibility of cure appears.

The same is true for the testimony about the gas-fire incident, for no claim of misconduct was raised below. The objection defense counsel raised was "1101(a), 352," referring to the Evidence Code, and the court responded, "Overruled." That objection came after Morse had been asked whether he considered gasoline to be highly volatile ("[i]t's flammable, yes"), had given an equivocal answer to whether it could be ignited by

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[4] "Q Okay. So you are not a radio car is what I was getting at? [¶] A Correct. [¶] Q And you are not—but you respond to calls and that sort of thing? [¶] A Yes. On this particular day, I was actually a radio car. [¶] Q Okay. That's what I'm trying to get at, on this particular day. So you were acting in your capacity just as a patrol officer responding to regular radio call's? [¶] A Yes, on this day."

a cigarette ("[t]heoretically, yes"), and had just been asked, "Don't you have experience in that matter?"

We do not agree with Morse that this violated a pretrial ruling or understanding. To the contrary, the prosecutor had left precisely this situation open. Morse had moved in writing to exclude his prior DUI felony as overly prejudicial (citing Evid. Code, § 352) and to exclude a misdemeanor for the gas-fire incident (petty theft for stealing gasoline) as "a less forceful indicator of immoral character or dishonesty than is a felony" (citing *People v. Wheeler* (1992) 4 Cal.4th 284, 296). At a pretrial hearing, the prosecutor conceded that a DUI might not involve the moral turpitude needed for general impeachment. On the misdemeanor, however, he explained:[5] "This particular conduct was Mr. Morse and a codefendant siphoning gas out of a Hertz truck in Vacaville. His codefendant dropped the ember off of his cigarette as the two of them were standing there and lit up the two Hertz trucks and burned the building. [¶] So if he's going to tell us during his testimony something to the effect that he didn't know this was gonna—you know, this bottle would have the flammable nature that it had or gasoline had the flammable nature, that conduct is certainly relevant, and I'll scramble to get the Vacaville officers who were present." The prosecutor said (with the court interjecting agreement), "[i]t may become relevant if he chooses to testify," "[b]ut right now, I don't anticipate using the conduct to impeach him" "[b]ecause it's just too minor, and probably a little bit too 352-ish, to use that term, since it was the theft of gasoline and this was a Molotov cocktail case." Thus, there was *no* ruling or agreement not to impeach Morse, should he testify as discussed, and the prosecutor's "too 352-ish" remark was directed to *general* impeachment, not to the situation here, where Morse appeared to deny knowing that gasoline was dangerous. Defense counsel understood, too, that admissibility would depend on Morse's testimony, for he closed by saying, "Well, I suppose then we can address that more fully if and when the time comes . . . ."

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5 The transcript mistakenly attributes these comments to *defense counsel*.

Once stripped of the misconception that the prosecutor violated a pretrial ruling, Morse's claim is simply that certain code requirements were not met for admitting the prior acts. He argues that, while misdemeanor acts may be admissible to test honesty or veracity (citing Evid. Code, § 785-786), there was an insufficiently "clear" foundational opportunity for him to admit or deny the dangerousness of his Molotov cocktail and that the court failed to expressly weigh prejudice against probative value (*id.*, § 352). The People urge that a sufficient foundation was laid and correctly note that express weighing is not required (*People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6). We do not decide the foundational issue, for it would fail to establish prosecutorial misconduct. Lack of objection below on the specific ground of opportunity to admit or deny waived the issue for appeal (*People v. Alvarez* (1996) 14 Cal.4th 155, 186) and, more importantly for the issue before us, leaves the record unclear whether the prosecutor could have met any meritorious objection. The prejudice/probative value issue, while raised and ruled upon below, would also fail to establish prosecutorial misconduct, even if meritorious, for the prosecutor was relying on the court's ruling.

III. "*Miranda" Custody*

Morse moved in limine to exclude from evidence his statements of arson intent as the fruits of custodial interrogation without the warnings required by *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). In a special hearing outside the jury's presence (Evid. Code, § 402), the court heard testimony from the arresting officer, Stuart Tan, and denied the motion, finding no custodial interrogation. Morse claims error. We find none.

A ruling on *Miranda* "custody" is a mixed question of fact and law to which we apply de novo review after deferring to all supported matters of basic fact and credibility. (*Thompson v. Keohane* (1995) 516 U.S. 99, 109-110, 112-113.) "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances,[] would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint

on freedom of movement" of the degree associated with a formal arrest.'" (*Id.* at p. 112; *People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

Confining ourselves to the pretrial testimony from Tan on which the court made its ruling, we see that Tan responded to the Dundee Court address of Morse's parents on a call of a disturbance at their home. Tan did not know Morse but had seen his name on a parole roster. Tan arrived just as Officer Larsen did. Seeing a man matching a general description driving away from the address in a 1988 Toyota Cressida and the parents watching him leave, Tan directed Larsen to stop the car because it had no license plates. Tan learned from speaking to the parents that Morse was indeed on parole (and that his name was Tim, not "Kim," as radioed). Within five minutes, Tan interviewed them and a Mr. Keisler. Tan learned that Larsen had stopped the car two blocks away, at an address on York Court, and confirmed by radio that Morse was on parole with a no-alcohol condition. Tan drove to the stop cite intending to conduct a parole search and question Morse about the reported disturbance.

Tan found Morse standing unhandcuffed outside the Toyota, and Larsen told Tan that he had done a weapons search, removed a 16-inch screwdriver from one of Morse's pockets and found "Leatherman"-type tool—usually containing a knife blade—in the car. Tan may or may not have conducted a pat search himself but, in any event, asked Morse if he was on parole and subject to search, whether he had anything illegal in the car, and whether he could search the car. Tan searched the passenger compartment, seeing the Leatherman tool on the front seat, and then the trunk. Morse stood at the rear of the car, still not handcuffed or arrested. Tan saw the incendiary device made of the Frappuccino bottle, held it up and asked, "What's this?" Morse told him it was "to fix his car with." Tan then gave Morse a questioning "puzzled look," whereupon Morse went on to say he had been fixing his car, had grown frustrated with not being able to get it to run right, and that he was "gonna use that device to burn up the vehicle in case he wasn't able to . . . fix his car." Tan searched the trunk a while longer but found nothing else. Then, without asking further questions, he arrested Morse and gave him *Miranda* advisements. Morse waived his rights and agreed to speak. Tan testified that, "kind of ongoing throughout the

contact," he also conversed with Morse "about" whether he had threatened his parents or Keisler and whether he had been drinking, although the answers and exact questions were never brought out at the hearing. "At some point," Tan also confirmed with Morse "that he had a 'no alcohol' term of his parole" and, by the time he saw the Frappuccino bottle, "had probable cause to believe he was in violation of his parole for drinking"; the record is silent, however, as to how Tan came to that conclusion and whether he communicated his suspicion to Morse.[6]

After the arrest and rights waiver, and again at the station, Morse explained about the Frappuccino bottle—that he was going to use it to torch the car if he could not fix it. He confirmed what he had already said but "in a little bit more detail," evidently adding that he had made the device himself and that it contained gasoline.

In denying the motion to exclude the statements, the court remarked: " . . . I don't think that there was sufficient evidence to cause a reasonable person to believe that they were in custody. There's no question [that] he was detained. And if you take a look at all the different cases that discuss this, it's one question, 'What's this?' I don't find that to be a violation of *Miranda*." The court had observed earlier that, for *Miranda* purposes, the subjective state of mind of an officer regarding custodial status, unless conveyed to the defendant, is not relevant to the objective inquiry whether a reasonable person in the circumstances would have felt restrained to a degree associated with formal arrest. The observation was correct. (*People v. Stansbury* (1995) 9 Cal.4th 824, 830.)

Independently assessing the essentially undisputed facts, we agree that there was no *Miranda* custody when Tan asked, "What's this?" and gave Morse the puzzled look which, Tan agreed, invited further explanation. No single factor is dispositive, but courts look to the site of the interrogation, whether the investigation has focused on the suspect,

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6 Defense counsel's written *Miranda* motion alluded to Tan's report as indicating that Morse "admitted to consuming alcohol, a violation of his parole" (and denied any altercation), but this was not brought out in Tan's hearing testimony. Defendant did not testify, and the record does not reflect that the officer's report was received in evidence. Thus any admission by Morse of drinking and thus being in violation of his parole was not before the court when it made its ruling on *Miranda* custody.

whether indicia of arrest are present, and the length and form of the questioning. (E.g., *People v. Morris* (1991) 53 Cal.3d 152, 197.) Morse was clearly detained for questioning and a parole search of his car, but if a detention for questioning, where one is transported by police and questioned in a locked jail section of a station, is not necessarily *Miranda* custody (*People v. Stansbury*, *supra*, 9 Cal.4th at pp. 831-835), then neither was this. We do not regard the weapons search as converting the encounter to a restraint of the degree associated with formal arrest, especially since the 16-inch screwdriver was likely sticking out of his pocket, a visible potential threat. The site was a public street, and Morse stood at the rear of the car, without handcuffs or other physical restraints. The questioning was evidently brief, and its nature and tone are undeveloped but do not appear to have been accusatory. Certainly the question "What's this?" and ensuing puzzled look were not. Morse stresses his no-alcohol parole term and Tan asking him about drinking, but there was no *evidence* at the hearing as to what was asked, its tone, or what Morse's responses were, if any. We know that Tan felt he had probable cause to arrest for a parole violation for drinking, but this could have been due to an alcohol smell, an unsteady gait, or slurred speech. We have no evidence that Tan communicated his suspicion of parole violation to Morse (see fn. 6, *ante*) and thus nothing to suggest that a reasonable person would have felt himself under restraints akin to formal arrest.

The *Miranda* ruling is supported and correct.

IV. "*Marsden*" *Inquiry*

Morse was both tried and sentenced on February 27, 2003, and he claims error in the court's failure to make an inquiry under *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) in response to a letter he penned, evidently without counsel's assistance, and lodged with the court sometime that day. The letter is file stamped "received," not filed, and the timing of its receipt in the court file is a mystery. There is no mention of it—by Morse, counsel or the court—anyplace in the reporter's transcript, strongly suggesting that it was filed at the close of the day's proceedings. The letter does not expressly seek a change of counsel but sets out five seeming points of discomfort with the actions of his counsel,

including an odd complaint that counsel had "no solid answer" for him when he asked, "[H]ow do I get grounds for appeal without filing a Marsden Motion?"[7]

Morse invokes the familiar rule that when a defendant seeks or moves for substitution of appointed counsel, the court must inquire into and consider any specific examples of inadequate representation the defendant raises. (*People v. Smith* (2003) 30 Cal.4th 581, 604; *People v. Webster* (1991) 54 Cal.3d 411, 435-436.) We acknowledge the People's argument that this letter did not ask directly for substitution of counsel, that, if it impliedly did, it recounted the problems with enough specificity that "a 'full blown hearing'" was probably not necessary (*People v. Horton* (1995) 11 Cal.4th 1068, 1103), that the request may have been untimely in any event (see *People v. Smith*, *supra*, 30 Cal.4th at pp. 606-607), and that the apparent disagreement over trial tactics, standing alone, would not have been enough to compel granting a hearing (*People v. Lucky* (1988) 45 Cal.3d 259, 281), let alone ordering substitution.

The problem we have, however, comes earlier in the analysis, for the record does not show that Morse tendered his letter before the trial and sentencing were over. Morse seems to assume that the court ignored the letter, but that is extraordinarily unlikely and unsupported by any reasonable inference from the record. Morse never mentioned it on

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[7] Addressed "ATTN: County Clerk" and internally dated "2/25/03" yet with a received stamp of February 27, the self-titled but unsworn "Original Sworn declaration" reads:

"1 I asked my attorney to file several motions he did not file.

"2 My Attorny wants to try my case one way and I want to try it another. So I don't really feel comfortable with my Attorney.

"3 He did not file a discovery motion also I requested transcripts I never received.

"4 He thought 10 minutes was adequate for a defense. I was not so sure about this so I exspressed these feelings to someone who called and he did come see me for a lil while on the day before my trial Yet I do not feel or am not certain that we were seeing eye to eye so to speak."

"5 I stated that we would go ahead and do it his way but I asked him how do I get grounds for appeal without filing a Marsden Motion? He Had no solid answer for me."

"I want to trust my Lawyer and have faith in the system. My family advised me to go for it that they thought he knew what he was talking about. So here I am."

the record, nor did his counsel, which suggests that counsel did not even know about it. Even the letter's position in the file—*after* the instructions and verdict and just before the minute order for the day—suggests a filing as or after the proceedings ended, and the fact that the letter was stamped "received" rather than filed likewise suggests a late filing or other irregularity. A court "is not obliged to initiate a *Marsden* motion sua sponte"; its duty to conduct a *Marsden* inquiry arises "'only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.'" (*People v. Lara* (2001) 86 Cal.App.4th 139, 158.) This record does not show the court to have been aware of the letter or any other manifestation of dissatisfaction with counsel sufficient to trigger an inquiry.

Marsden error is not shown.

DISPOSITION

The judgment is affirmed.

_____
Lambden, J.

We concur:

_____
Haerle, Acting P. J.

_____
Ruvolo, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY DOUGLAS MORSE, Defendant and Appellant.	A101894 (Solano County Super. Ct. No. 203963) **CERTIFIED FOR PARTIAL PUBLICATION**

THE COURT:

The opinion filed on March 5, 2004, is certified for publication pursuant to rules 976(b) and 976.1, of the California Rules of Court, and it is ordered published in the official reports, with the exception of parts II, III, and IV.

Haerle, Acting P. J.

Trial Court:	Solano County Superior Court
Trial Judge:	Honorable Harry S. Kinnicutt
	RODNEY RICHARD JONES, under appointment by the Court of Appeal for Defendant and Appellant, Timothy Douglas Morse
	BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA ROBERT R. ANDERSON, CHIEF ASSISTANT ATTORNEY GENERAL GERALD A. ENGLER, SENIOR ASSISTANT ATTORNEY GENERAL MARTIN S. KAYE, SUPERVISING DEPUTY ATTORNEY GENERAL RONALD E. NIVER, DEPUTY ATTORNEY GENERAL, Counsel for Plaintiff and Respondent